88-696

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO: 88-

in the

Supreme Court

of the

United States

October Term 1988

NICHOLAS B. WALLACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BENEDICT P. KUEHNE, ESQ.
Counsel of Record
JON A. SALE, ESQ.

SONNETT SALE & KUEHNE, P.A.
Atico Financial Center, #500
200 S.E. 1st Street
Miami, Florida 33131
Telephone: 305/358-2000

Counsel for Petitioner
NICHOLAS B. WALLACE

QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant in a criminal case entitled to a severance from the trial of a codefendant when it becomes evident during the course of a joint trial that the defendant has suffered uncorrectable prejudice by virtue of the spillover occasioned from his codefendant's defense?

2. In a fraud prosecution, is the government entitled to introduce evidence of the huge monetary nature of the charged fraud and the substantial monies received by a defendant, even though the financial evidence was irrelevant, prejudicial, and contrary to the defendant's Fifth Amendment guarantee of fundamental fairness?

3. Did the courts below fail to follow existing precedent in approving a criminal defendant's fraud convictions where the evidence failed to establish that the

accused was a knowing and intentional member of the charged conspiracy or that he knowingly participated in mail or wire fraud?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

LIST OF INTERESTED PERSONS. ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A SEVERANCE FROM THE TRIAL OF A CODEFENDANT WHEN IT BECOMES EVIDENT DURING THE COURSE OF A JOINT TRIAL THAT THE DEFENDANT HAS SUFFERED UNCORRECTABLE PREJUDICE BY VIRTUE OF THE SPILL-OVER OCCASIONED FROM HIS CODEFENDANT'S DEFENSE 7

II. IN A FRAUD PROSECUTION, THE GOVERNMENT IS NOT ENTITLED TO INTRODUCE EVIDENCE OF THE HUGE MONETARY NATURE OF THE CHARGED FRAUD AND THE SUBSTANTIAL MONIES RECEIVED BY A DEFENDANT WHERE THAT FINANCIAL EVIDENCE WAS IRRELEVANT, PREJUDICIAL, AND CONTRARY TO PRINCIPLES OF FUNDAMENTAL FAIRNESS 13

III. THE COURTS BELOW FAILED TO FOLLOW EXISTING PRECEDENT IN APPROVING A CRIMINAL DEFENDANT'S FRAUD CONVICTIONS WHERE THE EVIDENCE DID NOT ESTABLISH THAT THE ACCUSED WAS A KNOWING AND INTENTIONAL MEMBER OF THE CHARGED CONSPIRACY OR THAT HE KNOWINGLY PARTICIPATED IN MAIL OR WIRE FRAUD. 18

CONCLUSION 22

APPENDIX 23

TABLE OF AUTHORITIES

Cases **Page**

Glasser v. United States,
315 U.S. 60, 62 S.Ct. 457 (1942) . . 7

In re Winship, 397 U.S. 358,
90 S.Ct. 1068 (1970) 17

Kotteakos v. United States,
328 U.S. 750, 66 S.Ct. 1239 (1946) . 8

McNally v. United States,
_____ U.S. _____,
107 S.Ct. 2875 (1987) 15

Richardson v. United States,
150 F.2d 58 (6th Cir. 1945) 16

Stunz v. United States,
27 F.2d 575 (8th Cir. 1928) 16

United States v. Hartley,
678 F.2d 961 (11th Cir. 1982),
cert. denied, 459 U.S. 1170,
103 S.Ct. 815 (1983) 14

United States v. Pollack,
534 F.2d 964 (D.C.Cir.),
cert. denied, 429 U.S. 924,
97 S.Ct. 324 (1976) 15

United States v. Russell,
703 F.2d 1243 (11th Cir. 1983) . . . 8

United States v. Wallace,
853 F.2d 928 (11th Cir. 1988) . . . 2

Other Authorities

Fifth Amendment
United States Constitution . . . 3, 20
Rule 14
Federal Rules of Criminal Procedure 11

28 U.S.C. §1257(3) 2

NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

NICHOLAS B. WALLACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Nicholas B. Wallace, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit in this case, which affirmed the convictions and sentences of Nicholas B. Wallace entered in the United States Dis-

trict Court for the Southern District of Florida.

OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the criminal convictions and sentences of Nicholas Wallace in a non-published decision entered on June 30, 1988. United States v. Wallace, 853 F.2d 928 (11th Cir. 1988). That decision is reproduced in the Appendix. The same court denied rehearing on August 25, 1988. That order is also contained in the Appendix. The trial court did not render any written opinion specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). This petition is filed within the authorized

time period following the Eleventh Circuit's order on rehearing Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No persons shall... be deprived of life, liberty, or property without due process of law...

STATEMENT OF THE CASE

In April 1986, a Southern District of Florida grand jury returned a 44-count indictment in what has come to be known as the ESM case. The indictment set out a series of conspiracy and fraud offenses which led to the financial collapse of a group of investment companies. Nicholas Wallace, a titular president of one of the ESM companies, was among the nine defendants named in the indictment. The other defendants had various official or unofficial associations with the ESM group of companies. All defen-

dants except Wallace and Wolfe pled guilty prior to trial. Wallace was convicted after trial and sentenced to thirty years imprisonment; Wolfe was acquitted at that same trial.

The case against Wallace was circumstantial. The Wallace defense was that he was unaware of the fraud, that he was not a decision maker at the ESM companies, that he was not privy to the group's financial information, and that his particular operation - trading positions with the Chicago Board of Trade - was financially successful, in contrast with the massive losses incurred by the other ESM operations.

The government established that Wallace was a figurehead President of ESM Government Securities, Inc., that Wallace obtained approximately $7 million in officer loans and had repaid about $3 million of those

loans by the time of the ESM collapse, that Wallace testified as a witness in the Seneca divorce case, that Wallace was a party to the Novick - the financial mastermind of ESM - will fraud, that Wallace returned to ESM employment after leaving for approximately six months, and that Wallace's facsimile signature appeared on "safekeeping" letters.

The prosecution's evidence reflected that ESM lost money through its investments, and concealed those losses from customers and the public through false journal entries, false financial statements, over-pledging collateral to cover multiple loans, concealing excessive borrowing, and failing to segregate customer accounts. The ESM principals - not Wallace - also corrupted the "independent auditor" into certifying the false financial statements as correct.

The ESM fraud unravelled as a result of regulatory inspections, customer inquiries, the disclosures made during the Seneca divorce proceedings, the resignation of Pete Summers and the "buy out" of his interest in the companies, and, most critically, the untimely death of Alan Novick, who was able to keep the fraud afloat for such a long time. At the time of the ESM closing, the financial losses were estimated at $300 million.

During Wallace's trial, the prosecution repeatedly emphasized the astronomical monetary losses incurred as a result of the ESM fraud, even though the dollar amounts were not necessary to the government's proof. That evidentiary error was raised as an issue on appeal, along with the sufficiency of the evidence, the prosecutor's inflammatory closing argument, and the prejudice

which resulted from a joint trial. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the convictions in an unpublished decision and thereafter denied rehearing. The entire text of the appellate decision relating to Wallace is as follows:

> The conviction of Wallace is AFFIRMED. See 11th Cir. R. 36-1.

REASONS FOR GRANTING THE WRIT

I. A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO A SEVERANCE FROM THE TRIAL OF A CODEFENDANT WHEN IT BECOMES EVIDENT DURING THE COURSE OF A JOINT TRIAL THAT THE DEFENDANT HAS SUFFERED UNCORRECTABLE PREJUDICE BY VIRTUE OF THE SPILLOVER OCCASIONED FROM HIS CODEFENDANT'S DEFENSE.

When it becomes evident during the course of a criminal trial that a codefendant's active defense substantially benefits the prosecution's case against the defendant, that defendant is entitled to a separate trial. This Court has long recognized

that in some cases "the liberal rules of evidence and wide latitude accorded the prosecution may, and some times do, operate unfairly against an individual defendant..." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 468 (1942). The "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239 (1946). Thus, in situations where a joint trial causes a defendant to suffer compelling prejudice against which a trial judge cannot afford protection, a severance is required. United States v. Russell, 703 F.2d 1243, 1247 (11th Cir. 1983).

In the present case, the joint trial of Petitioner and his codefendant had the practical effect of precluding Petitioner

from presenting an individual defense. The defense postured by the codefendant placed Petitioner in the position of having to defend against two accusers, such that the danger persisted during the course of the trial that the jury would be unable to reflect on the evidence in an individualized manner.

At stake in this case is a criminal defendant's right to confront his accuser and to challenge the prosecution's case. That cannot be done when the codefendant, who in this case was acquitted, took every opportunity to contrast his own case from that of the Petitioner. The practical effect was that Petitioner fought two accusers.

The defense offered by Petitioner in this financial fraud case was that other defendants, most of whom were testifying

against him, masterminded and orchestrated the fraud scheme and caused the acts to be committed, without any knowing participation by Petitioner. When the charged crimes occurred, as many of the witnesses stated, it was only because Petitioner blindly followed the direction of the financial masterminds, unaware that his conduct was being manipulated to fit within their carefully orchestrated plan to defraud investors. It was crucial, in this type of case, for Petitioner to be able to demonstrate the magnitude of the difference between his activities and that of the fraud architects.

Petitioner's defense was possible only so long as his codefendant was not posturing the sharp contrast between the "big money" corporate officers, with their impressive titles and influential-sounding roles, and mere employees who were denied all substan-

tial benefit and had no oversight as to the complex corporate plan. The codefendant's defense, then, placed Petitioner on the same side as the masterminds of the fraud, perpetrators whose guilt was so evident that it was impossible for Petitioner to disentangle himself from the conspiratorial web woven by the codefendant. Petitioner tried, unsuccessfully, to distinguish himself from those others. But, with the codefendant ready, willing, and able to drive that point home, Petitioner could not fairly expect that his defense would be considered.

This Court should take this opportunity to clarify the limitations on the conduct of a joint trial. The central theme of Rule 14 of the Federal Rules of Criminal Procedure must be given direction by this Court, so that criminal defendants and the prosecution know the parameters of evidence

which can be adduced at a joint trial. Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

In this case, the key issues of Petitioner's knowing involvement and participation in the fraud scheme were distorted by the codefendant's defense, such that Petitioner's entire case was in jeopardy, independent of the government's presentation of evidence. It is not difficult to see how the jury could become so misdirected that it would be unable to deliberate on Petitioner's guilt or innocence on the basis of the prosecution's case against Petitioner. As compelling prejudice became apparent during the course of the trial, the trial court was

obligated to order a severance. The failure of the appellate court to grant that relief warrants review by this court, in view of the potential for prejudice to this criminal accused and many other similarly situated defendants.

II. IN A FRAUD PROSECUTION, THE GOVERNMENT IS NOT ENTITLED TO INTRODUCE EVIDENCE OF THE HUGE MONETARY NATURE OF THE CHARGED FRAUD AND THE SUBSTANTIAL MONIES RECEIVED BY A DEFENDANT WHERE THAT FINANCIAL EVIDENCE WAS IRRELEVANT, PREJUDICIAL, AND CONTRARY TO PRINCIPLES OF FUNDAMENTAL FAIRNESS.

This criminal case was an unusual one, because it allowed the prosecution to highlight throughout the case the huge financial losses incurred by ESM. Those losses, argued by the government to be $300 million, but in fact were a mere percentage of that amount, had no relationship to the elements of the charged fraud offenses. Instead, those losses were bandied about by the

prosecution in an effort to cloud the jurors' minds to the necessary elements of the crime. The repeated emphasis on the huge monetary losses allowed the government to drive home the point that the ultimate victims in this case were the taxpayers and the municipalities who became financially devastated by virtue of the ESM fraud.

This case presents an unparalleled opportunity for this Court to evaluate the circumstances under which irrelevant and prejudicial evidence can be excluded from the course of a criminal trial. Where the evidence is so devastating that the jury had no reason to consider the required elements of the offense, but instead could view the nature of the losses as sufficient indication of guilt, it is incumbent upon the judiciary to protect that defendant from fundamental unfairness.

In a fraud case, the elements to be proved by the government include intent to participate in a scheme to defraud and the use of the mails or the wires to execute the scheme to defraud. E.g., United States v. Hartley, 678 F.2d 961, 985 (11th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S.Ct. 815 (1983). This Court recognized recently in McNally v. United States, _____ U.S. _____, 107 S.Ct. 2875 (1987), that the mail fraud statute was designed to protect against schemes to deprive people of money or property of value, whether the scheme is successful or not. Thus, allegations that the fraudulent scheme benefitted a defendant or caused injury to the intended victims are irrelevant to a fraud indictment. See United States v. Pollack, 534 F.2d 964, 971 (D.C.Cir.), cert. denied, 429 U.S. 924, 97 S.Ct. 324 (1976). Evidence of massive

losses to investors has no real relationship to a prosecution except to portray the defendant in an unfair role. Where the nature of the alleged losses becomes a feature point in the trial, then quite clearly that defendant needs protection from the court.

In Petitioner's case, no protection whatsoever operated to remind the jury that the case was not about losses, but about a fraud scheme. Where the evidence repeatedly was directed to the losses, with Petitioner being unable to reorient the course of the case, Petitioner was severely prejudiced. As in Stunz v. United States, 27 F.2d 575 (8th Cir. 1928)(evidence that defendant's business profits exceeded $300,000 irrelevant to elements of a fraud prosecution), and Richardson v. United States, 150 F.2d 58 (6th Cir. 1945)(fraud convictions re-

versed on evidence about inflated profits and large amounts of money, which had an undue tendency to prejudice the jury), Petitioner was unfairly convicted. The appellate court's refusal to address this issue, in light of the precedents supporting Petitioner's position, warrants evaluation by this court, as the underlying conclusion of the appellate court has a tendency to cause friction among the circuits. Moreover, issues of this type are precisely the area where direction need be given to the trial courts, so that courts can properly direct criminal cases to relevant, rather than irrelevant issues.

III. THE COURTS BELOW FAILED TO FOLLOW EXISTING PRECEDENT IN APPROVING A CRIMINAL DEFENDANT'S FRAUD CONVICTIONS WHERE THE EVIDENCE DID NOT ESTABLISH THAT THE ACCUSED WAS A KNOWING AND INTENTIONAL MEMBER OF THE CHARGED CONSPIRACY OR THAT HE KNOWINGLY PARTICIPATED IN MAIL OR WIRE FRAUD.

In all criminal cases, the prosecution has the responsibility of proving each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). Yet, in this case, the appellate court affirmed Petitioner's convictions while overlooking abundant evidence which established that Petitioner was a mere pawn in a clever and complex fraud scheme. By mistakenly overlooking the distinction between an ongoing fraud and a person's knowing and voluntary actions in furtherance of a scheme to defraud, the appellate court reached a con-

clusion which is contrary to existing precedent.

The evidence in this case, considered in the light most favorable to the prosecution, did no more than prove that Petitioner was a highly paid figurehead president of ESM who had no decision making authority, was not part of the ESM inner circle of decision makers, and did nothing to cause the fraud or to continue its operation. The evidence demonstrated that Petitioner was as much a victim as were the defrauded investors, that Petitioner was placed in a position where he would be an easy target for anyone to point a finger. That type of evidence has never been sufficient to establish participation in a conspiracy or a fraud scheme.

The situation now presented to this Court is controlled by a substantial body

of precedent which, unfortunately, was not applied to this case. The record of proceedings in this case demonstrates that Petitioner was neither a perpetrator nor a knowing participant. Yet, by finding the evidence sufficient to support the convictions, the Eleventh Circuit failed to correctly comprehend the relevant facts and consider the correct evidentiary standard. The appellate court's perception of the case might be justified if Petitioner acted in a manner consistent with the title of president by making decisions, engaging himself in the policy of the companies, or being in a position of authority over employees. In fact, Petitioner did none of that.

Petitioner submits that this Court must review the standard of evidentiary sufficiency applied by the Eleventh Circuit to affirm this conviction. Petitioner's con-

victions, under any standard of evidentiary sufficiency, should not have been affirmed. The Eleventh Circuit's ruling causes disharmony with respect to constitutional principles of evidentiary sufficiency. Petitioner was denied his constitutional right to due process, as guaranteed by the Fifth Amendment to the United States Constitution. The danger present in this case is that businessmen, not bound by any rigid code of ethics and work standards, will be subject to criminal prosecution and punishment because of what appears to be an application of strict liability with respect to endeavors by their companies. This case presents a critical opportunity for this Court to clarify this very important, but hazy, area of criminal law. This Court should issue its writ of certiorari to correct the injustice found herein.

CONCLUSION

For the reasons stated, this court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

BENEDICT P. KUEHNE, Esq.
Counsel of Record
JON A. SALE, Esq.

SONNETT SALE & KUEHNE, P.A.
Atico Financial Center, #500
200 S.E. 1st Street
Miami, Florida 33131
Telephone: 305/358-2000
Counsel for Petitioner

October 24, 1988

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICHOLAS B. WALLACE,
GEORGE G. MEAD,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Florida

(June 30, 1988)

Before RONEY, Chief Judge, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

Mead pled guilty to and Wallace was convicted of several counts of fraud relating to ESM Governmental Securities, Inc. At the sentencing hearing, Mead objected to some of the facts contained in his presentence investigation report ("PSI"). The disputed facts related to Mead's knowledge of the fraud and to his ultimate cooperation with the Securities and Exchange Commission. The government concedes that the district court did not fully comply with Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure by failing to either state that the sentence was not based on the disputed facts or resolve the alleged discrepancies in the PSI. Therefore, we vacate Mead's sentence and remand the case so the district court can either issue a statement of non-reliance or resolve the

factual dispute and impose a new sentence. Mead's sentence is VACATED and REMANDED.

The conviction of Wallace is AFFIRMED. See 11th Cir. R. 36-1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-5879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICHOLAS B. WALLACE and
GEORGE G. MEAD,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(August 25, 1988)

BEFORE: RONEY, Chief Judge, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Nicholas B. Wallace is denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge